(2)

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1293

In the Supreme Court of the United States

OCTOBER TERM, 1987

JEETENDRA BHANDARI,
Petitioner

versus

FIRST NATIONAL BANK OF COMMERCE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES B. IRWIN*
CATHERINE KIRGIS SIMPSON
MONTGOMERY, BARNETT, BROWN, READ, HAMMOND & MINTZ
1800 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 561-8989

MARTA ALISON RICHARDS
MONTGOMERY & RICHARDS
1410 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 522-1717

Attorneys for Respondent
*Counsel of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

23 pp

QUESTION PRESENTED

Does 42 U.S.C. § 1981 prohibit alienage discrimination in the making of private contracts?

PARTIES TO THE PROCEEDING

The following list of all parent, subsidiary and affiliate companies of the First National Bank of Commerce, is provided pursuant to Supreme Court Rule 28.1:

First Commerce Corporation
First National Bank of Lafayette
City National Bank of Baton Rouge
Rapides Bank and Trust Company of Alexandria
The First National Bank of Lake Charles
First Commerce Service Corporation
First Commerce Investment Service, Inc.
First Commerce Mortgage Corporation
New Orleans Bancshares, Inc.

TABLE OF CONTENTS

Page

Question Presented i
Parties to the Proceeding ii
Table of Contents iii
Table of Authorities iv
Statement of the Case 1
Summary of the Argument 3
Argument 3

I. The Fifth Circuit's Decision Does Not Conflict With the Precedents of This Court 3

II. The Fifth Circuit's Decision is in Full Accord With Congressional Intent as Evidenced by the Legislative History of § 1981 6

III. The Fifth Circuit's Decision Did Not Withhold any Right From Bhandari which Congress Intended that He Have 13

IV. The *Runyon* Debate is Irrelevant to this Case 14

Conclusion 16

TABLE OF AUTHORITIES

CASES **Page**

The Civil Rights Cases, 109 U.S. 3 (1883).....7

Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86 (1973).....2,13

General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982).....5

Graham v. Richardson, 403 U.S. 365 (1971).....4

Guerra v. Manchester Terminal Corporation, 498 F.2d 641 (5th Cir. 1974).....2,4

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).....2

Johnson v. Railway Express Agency, 421 U.S. 454 (1975).....5

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).....5,7,15

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).....5

Patterson v. McLean Credit Union, 56 U.S.L.W. 3735 (U.S. Apr. 25, 1988 (No. 87-107)).....14,15

Runyon v. McCrary, 427 U.S. 160 (1976).....5,14,15,16

Saint Francis College v. Al-Khazraji, 107 S.Ct. 2022 (1987).....5,6

Shaare Tefila Congregation v. Coff, 107 S.Ct. 2019 (1987).....5,6

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).....5

Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973).....5

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).....4

United States v. Cruikshank, 92 U.S. 542 (1875).....7

TABLE OF AUTHORITIES

CASES **Page**

United States v. Wong Kim Ark, 169 U.S. 649 (1898).....4

Yick Wo v. Hopkins, 118 U.S. 356 (1886).....4

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIII.....7

U.S. Const. amend. XIV.....7,12,13

FEDERAL STATUTES

Act of May 4, 1870, ch. 72, 16 Stat. 96.....11

Act of June 27, 1866, ch. 140, 14 Stat. 74.....11

The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866).....passim

The Voting Rights Act of 1870, ch. 114, 16 Stat. 140, 144 (May 31, 1870).....3,11,12,13,14,15

8 U.S.C. § 1324b.....13,14

15 U.S.C. § 1691.....1,13

42 U.S.C. § 1981.....passim

42 U.S.C. § 1982.....6,11,12

42 U.S.C. § 2000e, *et seq*.....14

Sup. Ct. R. 17.....3

LEGISLATIVE HISTORY

Cong. Globe, 41st Cong., 2d Sess. (1870).....8,9,10,11

Cong. Globe, 41st Cong., 2d Sess. (1869).....7

S. 810, 41st Cong., 2d Sess. (1870).....9,10

S. 365, 41st Cong., 2d Sess. (1870).....7,8,9,10,11

H.R. 1293, 41st Cong., 2d Sess. (1870).....9,10

No. 87-1293

In the Supreme Court of the United States
OCTOBER TERM, 1987

JEETENDRA BHANDARI,
Petitioner

versus

FIRST NATIONAL BANK OF COMMERCE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Jeetendra Bhandari filed suit in the United States District Court for the Eastern District of Louisiana against the First National Bank of Commerce (hereinafter "FNBC"), pursuant to The Equal Credit Opportunity Act (hereinafter "ECOA"), 15 U.S.C. § 1691, and 42 U.S.C. § 1981 (hereinafter "§ 1981"), claiming alienage discrimination when FNBC rejected his application for a VISA card on the basis that he was not a United States citizen. He also claimed discrimination on the basis of national origin and charged FNBC with a violation of the technical notice provisions of the ECOA. Bhandari sought actual and punitive damages, as well as declaratory and injunctive relief, and prayed for attorney's fees.

Suggesting that *Guerra v. Manchester Terminal Authority*, 498 F.2d 641 (5th Cir. 1974), was no longer controlling, the district court dismissed the § 1981 claim for private alienage discrimination and, following *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973), held that the ECOA does not provide a cause of action for discrimination on the basis of alienage. (Petitioner's Appendix D). The district court dismissed the national origin claims and refused to award punitive damages. The court did award damages and attorney's fees based on a technical notice violation. Finally, the claims for injunctive relief were dismissed as moot.

On appeal, a panel of the Fifth Circuit, citing its policy that one panel does not overrule another, "reluctantly reaffirm[ed] the holding of *Guerra*" (Petitioner's Appendix B at 77a) and reversed the lower court's dismissal of the § 1981 claim for private alienage discrimination. The court indicated its disapproval of *Guerra* with the statement that it could not "avoid the conclusion that *Guerra* was wrongly decided", (Petitioner's Appendix B at 59a) and remanded the case for a determination of attorney's fees in accordance with the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

FNBC petitioned the Court of Appeals for a rehearing en banc, which was granted, and on October 5, 1987, the Fifth Circuit overruled *Guerra*, holding that § 1981 does not prohibit alienage discrimination in the making of private contracts.

Bhandari has petitioned this Court for a Writ of Certiorari to review the Fifth Circuit's en banc decision.

SUMMARY OF THE ARGUMENT

The Fifth Circuit held that 42 U.S.C. § 1981 (a recodification of The Civil Rights Act of 1866 and The Voting Rights Act of 1870) does not prohibit private alienage discrimination. This does not conflict with Supreme Court precedent, which has held only that § 1981 proscribes governmental discrimination against aliens.

The legislative history of § 1981 fully supports this position. The author of the Senate version of The Voting Rights Act stated: "This simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section."

The Court of Appeals did not withhold from Bhandari any right which Congress intended him to have, and this Court should not extend § 1981 beyond the boundaries delineated by Congress which historically has established different limits for racial and alienage discrimination.

ARGUMENT

I. The Fifth Circuit's Decision Does Not Conflict With the Precedents of This Court.

Bhandari's sole basis for suggesting that this Court should issue a Writ of Certiorari is the unsupported claim that the Fifth Circuit's en banc decision conflicts with applicable decisions of this Court.[1] To the contrary, the Fifth

---

[1] Supreme Court Rule 17 provides guidelines indicating the general character of reasons governing review on certiorari. Another consideration suggested by the rule is where the federal court of appeals has rendered a decision in conflict with that of another circuit. That reason is not urged by Bhandari. Indeed, it does not exist.

Circuit's decision overruling *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), and thus limiting the application of 42 U.S.C. § 1981 to alienage discrimination under color of state law, is correct and in full accord with the decisions of this Court. Bhandari has attempted to manufacture the "conflict" with two double negatives.

The first double negative stems from Bhandari's contention that this Court has never "suggested that its reasoning [that § 1981 bars alienage discrimination under the color of law] should not apply to a private action." (Petition at 9). Bhandari concedes that this Court's decisions applying the protection of § 1981 to aliens "have all occurred in the context of governmental discrimination." *Id.* Specifically, *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948), held that § 1981 protected " ' all persons' [meaning citizens and aliens] against *state legislation* bearing unequivocally upon them because of alienage." (emphasis added). Justice Black, writing for the majority, explained:

> The Fourteenth Amendment and the laws adopted under its authority [§ 1981] thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of *legal* privileges with all citizens under non-discriminatory *laws*. *Id.* (emphasis added).

Every other case relied upon by Bhandari addresses only discrimination under color of law.[2] In the absence of precedent, Bhandari uses the double negative to extend unjustifiably the principles of state action cases to private contracts.

---

[2] *Graham v. Richardson*, 403 U.S. 365 (1971); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The second double negative arises from Bhandari's argument that "never has this Court intimated that this clause [§ 1981] would not apply to alienage discrimination." (Petition at 10). Although Bhandari acknowledges that this Court has only applied § 1981 to the "private sector. . .in the context of racial discrimination", he misplaces reliance on *Runyon v. McCrary,* 427 U.S. 160 (1976), for the proposition that § 1981 should be extended to private alienage discrimination. (Petition at 9-10). Bhandari ignores the *Runyon* Court's recognition that the facts there did not involve "the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." 427 U.S. at 167. Likewise, the other cases relied upon by Bhandari all addressed racial discrimination in one form or another.[3] None remotely involved alienage discrimination. As with the first double negative, Bhandari nevertheless uses the racial discrimination cases to broaden the scope of § 1981 to encompass private alienage discrimination.

Bhandari combines the two double negatives to reach, illogically, his "inescapable conclusion" that "Section 1981 bars alienage discrimination in the making of private contracts." (Petition at 10). Bhandari emphasizes *Saint Francis College v. Al-Khazraji,* 107 S.Ct. 2022 (1987), to reach his "inescapable conclusion." This logic is flawed: *Saint Francis College* is purely a race case. Justice White, writing for the unanimous Court, concluded that if the

---

[3] *Shaare Tefila Congregation v. Coff,* 107 S.Ct. 2019 (1987); *Saint Francis College v. Al-Khazraji,* 107 S.Ct. 2022 (1987); *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976); *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975); *Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

complainant can prove he has been discriminated against on the basis of his ancestry or ethnic characteristics, *rather than solely on national origin or religion,* such discrimination may be considered racial if the particular ethnic group would have been considered a distinct race which Congress intended to protect.[4] 107 S.Ct. at 2028.

Bhandari's final "equation" is: because the Supreme Court has *never* said that § 1981 should *not* apply to private alienage discrimination, the Fifth Circuit's decision conflicts with Supreme Court precedent. No conflict exists, and an examination of the legislative history of § 1981 will reveal that the Fifth Circuit's decision comports with congressional intent and the decisions of this Court.

II. The Fifth Circuit's Decision is in Full Accord With Congressional Intent as Evidenced by the Legislative History of § 1981.

The legislative history demonstrates that Congress intended § 1981 to prohibit alienage discrimination only under color of state law. As evidenced by legislative history, the Fifth Circuit's decision is in full accord with congressional intent. The historical genesis of § 1981 is § 1 of The Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (April 9, 1866), which granted to all United States *citizens* the same rights to make and enforce contracts and inherit, purchase, lease, sell, hold and convey real and personal property, as are enjoyed by *white citizens.* It sought only to

[4] Likewise, in *Shaare Tefila Congregation,* 107 S.Ct. 2019, members of a Jewish synagogue were entitled to bring a § 1982 claim because, when § 1982 was passed, Jews were considered to be a distinct *race* which Congress intended to protect. Notably, Bhandari amended his complaint to allege discrimination on account of race, but later, voluntarily dismissed that claim. The district court commented on this voluntary dismissal and observed that "the record discloses no racial discrimination effected secondarily through actions allegedly directed against Indian nationals." (Petitioner's Appendix A at 87a).

redress wrongs related to racial discrimination and was intended to protect citizens "in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude." *United States v. Cruikshank*, 92 U.S. 542, 555 (1875). The purpose was to implement the Thirteenth Amendment outlawing slavery and to eradicate its " 'badges and incidents'." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), quoting, *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

In 1870, Senator Stewart of Nevada, in response to a Senate resolution[5] mandating inquiry into violations of the Fourteenth Amendment by the states, introduced a bill to extend the 1866 Civil Rights Act to give aliens equal protection under the laws. S. 365, 41st Cong., 2d Sess. (1870) (hereinafter "S. 365"). The bill divided the 1866 Act into three sections. Section 1 enlarged the scope of protection by giving to "all persons", rather than to citizens alone, the right to make and enforce contracts but omitted the phrase "to inherit, purchase, lease, hold and convey real and personal property" found in § 1 of the 1866 Act.[6]

---

5 *Resolved*, That the Committee on the Judiciary be requested to inquire *if any States are denying* to any class of persons within their jurisdiction *the equal protection of the law*, in violation of treaty obligations with foreign nations and of section one of the *fourteenth amendment* to the Constitution; and if so, what legislation is necessary to enforce such treaty obligations and such amendment, and to report by bill or otherwise. Cong. Globe, 41st Cong., 2d Sess. 3 (1869)(emphasis added).

6 In the Fifth Circuit panel decision, Judge Gee explained the omission as reflecting the then current restrictions on the ownership and control of real property by aliens (Petitioner's Appendix B at 43a) and quoted a portion of the following exchange which provides insight into the author's intent that the bill extend to aliens the equal protection of the laws only:

> Mr. Stewart. I move that the Senate proceed to the consideration of bill (S. 365) to secure to all persons equal

Section 2 of the bill extended the coverage of the 1866 Act to provide for the punishment of any person who, *under color of state law,* deprived any inhabitant of any state or territory of any right secured by the Act on the basis of alienage, and § 3 reenacted the 1866 Act.

Senator Stewart explained the purposes of S. 365 and its relationship to the Civil Rights Act as follows:

> The original civil rights bill protected all persons born in the United States in equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill. Cong. Globe, 41st Cong., 2d Sess. 1536 (1870) (hereinafter "Cong. Globe").

(Footnote 6 continued)

> protection of the laws. I do not think it will take more than a moment to pass that bill.
>
> Mr. Hamilton. I desire that this bill be read.
>
> * * *
>
> Mr. Pomeroy. I have not examined this bill, [S. 365] and I desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?
>
> Mr. Stewart. No; it gives all the protection of laws. If the Senator will examine this bill in connection with the original civil rights bill [the 1866 Act], he will see that it has no reference to inheriting or holding real estate.
>
> Mr. Pomeroy. That is what I was coming to.
>
> Mr. Stewart. The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section. Cong. Globe, 41st Cong., 2d Sess. 1536 (1870).

Senator Stewart's statement that the bill "simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section", Cong. Globe at 1536, demonstrates that he, as the author of the bill, intended that it prohibit discrimination against aliens only where state action was involved. Further, his assertion that the 1866 Civil Rights Act "had several other things applying to citizens" shows his intent that the protection of S. 365 be less extensive than that of § 1 of the 1866 Act. *Id.*

Later, in the same session of Congress, Senator Edmunds introduced S. 810, 41st Cong., 2d Sess. (1870) (hereinafter "S. 810"), which was amended to include S. 365. *Id.* at 3480. Meanwhile, the House of Representatives passed H.R. 1293, 41st Cong., 2d Sess. (1870) (hereinafter "H.R. 1293"), its version of substantially the same legislation. *Id.* at 3561-2. With respect to H.R. 1293, Senator Stewart again expressed his understanding that the proposed legislation as it related to aliens was intended to protect only against state action:

> While [Chinese aliens] are here I say it is our duty to protect them.*** It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist...that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws

> and the same laws that other men are. That is all there is in that provision.
>
> **** The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws. Your treaty says that they shall have the equal protection of the laws. Justice and humanity and common decency require it. Cong. Globe at 3658.

On May 21, 1870, the Senate passed H.R. 1293 including S. 810 as amended by S. 365. *Id.* at 3690. A conference report, issued to reconcile the differences between the Senate and House bills, recommended adoption of the equal protection provisions without substantive change. *Id.* at 3752. In the House of Representatives, the only debate on the equal protection provisions occurred during the debate on the conference report. Representative Bingham, the sponsor of H.R. 1293, a House conferee, and the floor manager of the conference report, discussed what was called a "provision regulating the imposition of taxes upon immigrants by the legislation of the respective States." *Id.* at 3871. He characterized the substance of the provision:

> [T]he *States* shall not hereafter discriminate against the immigrant from China and in favor of the immigrant from Prussia, nor against the immigrant from France and in favor of the immigrant from Ireland; immigrants being persons within the express words of the fourteenth article of the constitutional amendments, shall... be entitled to the equal protection of the laws, not simply of the State itself, but of the Constitution of the United States as well. *Id.* (emphasis added).

During the Senate debate on the equal protection provisions, Senator Stewart, speaking as a Senate conferee on the report, emphasized that Congress could not allow "a State in this Union to pass barbarous and cruel laws, to place upon [Chinese immigrants] unjust and cruel burdens, to tax them differently from other people and collect that tax in a brutal manner." Cong. Globe at 3807-8. He then cited various discriminatory measures pending in the California legislature and quoted extensively from his earlier remarks regarding Chinese aliens. *Id.*

Senator Stewart then challenged Senator Casserly of California who had criticized the equal protection provisions:

> Dare he say to the good people of California that while the Chinese are here under our laws, and while we have a Constitution which says that no State shall deny to any person within its jurisdiction the equal protection of the laws, Congress ought not to pass a law to give them protection? *Id.* at 3808.

The 1870 Act passed with §§ 1, 2, and 3 of S. 365 evolving into §§ 16, 17 and 18 respectively. The Voting Rights Act of 1870, ch. 114, 16 Stat. 140, 144 (May 31, 1870).

In 1866, Congress authorized a codification of federal statutes. Act of June 27, 1866, ch. 140, 14 Stat. 74, reenacted by Act of May 4, 1870, ch. 72, 16 Stat. 96. Thus, The Civil Rights Act of 1866 and The Voting Rights Act of 1870 were codified in §§ 1977 and 1978 of the Revised Statutes of 1874, which later became, and now are, 42 U.S.C. §§ 1981 and 1982, respectively. As Judge Gee explained in the panel decision:

> The codifiers confronted the overlapping civil rights statutes. The 1870 Act gave 'all persons'

> certain rights; the 1866 Act protected only citizens but gave a broader range of rights. Section 16 appeared to subsume all but the property-rights aspect of § 1, since the language was closely parallel and the class of persons protected was a superset of the class protected by § 1. The Revisers' solution was to carve out the property rights given to citizens only, to put these in § 1978 of the Revised Statutes (now § 1982), and to put part of § 16 of the 1870 Act in § 1977 of the Revised Statutes (now § 1981). Thus, § 1982 is a fragment of § 1 of the 1866 Act, while § 1981 is an amalgam of part of § 1 and most of § 16 of the 1870 Act. (Petitioner's Appendix B at 45a-46a).

The legislative history demonstrates disparate treatment of racial and alienage discrimination. Regardless, whether Congress in 1866 intended to prohibit racial discrimination in the private sector is not relevant to this case. The issue is whether Congress in 1870 intended to proscribe private alienage discrimination. The legislative history demonstrates that Congress did not: because The Voting Rights Act of 1870 was enacted to implement the recently passed Fourteenth Amendment, state action is mandated for alienage discrimination to violate § 1981. While § 1981 must be interpreted differently for different classes of persons, such an interpretation is warranted because the present law is, in Judge Gee's words, an "amalgam" derived from two statutes similar in wording but enacted for different purposes. (Petitioner's Appendix B at 46a).

III. The Fifth Circuit's Decision Did Not Withhold any Right from Bhandari which Congress Intended that He Have.

The intent of Congress in 1870 is clear: The Voting Rights Act was designed to implement the Fourteenth Amendment and to proscribe discrimination by the states. If Congress had intended to protect aliens from discrimination by lending institutions, it could have done so in 1974 with the passage of the Equal Credit Opportunity Act[7] which prohibits discrimination based on race and other categories including national origin, but not alienage.[8] Instead, Congress chose not to do so, and this Court should not extend § 1981 to proscribe private alienage discrimination in contravention of congressional intent. As Judge Gee, writing for the en banc court, stated, if § 1981 protected against private alienage discrimination as well as private racial discrimination in employment, Congress would not have deemed it necessary to enact The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b[9] to

---

[7] 15 U.S.C. § 1691 provides in pertinent part:

> (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction--
>
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age....

[8] It is axiomatic that national origin discrimination does not encompass alienage discrimination. *See, e.g., Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). The district court below found that the "record is also devoid of any indication of any denial of credit based upon a particular nationality or that any particular nationality was considered as a factor in evaluating credit. There was no inquiry on the credit applications into nationality or place of birth." (Petitioner's Appendix D at 86a).

[9] 8 U.S.C. § 1324b provides in pertinent part:

> (a) Prohibition of Discrimination based on national origin or citizenship status

prohibit discrimination in employment on the basis of alienage. (Petitioner's Appendix A at 18a). Instead, Congress endured what the Fifth Circuit described as "heroic exertions" in order to pass § 1324b. *Id.* Had Congress felt that alienage and race deserved identical treatment, it could have easily added "citizenship" to the categories of "race, color, religion, sex [and] national origin" protected by Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Petitioner's Appendix A at 17a). The result of the Fifth Circuit's decision is therefore correct in its refusal to extend § 1981 beyond the boundaries intended by Congress.

IV. The *Runyon* Debate is Irrelevant to this Case.

To resolve the question raised by Bhandari's petition, it is unnecessary to join the *Runyon* debate over whether § 1981 prohibits *racial* discrimination in the making of private contracts, an issue which is currently before this Court in *Patterson v. McLean Credit Union*, 56 U.S.L.W. 3735 (U.S. Apr. 25, 1988 (No. 87-107)). The *Runyon* debate is distinguished from the question presented in Bhandari's petition by the historical difference between § 1 of The Civil Rights Act of 1866 and § 16 of The Voting Rights Act of 1870. The difference is ultimately answered

---

(Footnote 9 continued)

(1) General rule

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment–
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a citizen or intending citizen..., because of such individual's citizenship status.

by the legislative intent. That is the heart of the distinction, explaining fully (1) why this Court ordered reargument in *Patterson* and (2) why this Court should deny Bhandari's petition. In the *Runyon* debate over § 1, both sides can marshal volumes of historical evidence to support their positions on legislative intent. As revealed by the presentations of the majority and dissenting opinions in *Runyon* and *Jones*, for every Senator or Congressman the majority can quote on the subject of civil rights, the dissent can counter with another Senator or Congressman speaking to state action. Such is not the case regarding § 16 and the protection of aliens. There is no debate. The evidence is one-sided. Section 16 requires state action.

The distinction between § 1 of the 1866 Act and § 16 of the 1870 Act reflects the election by Congress, 118 years ago, to treat the subjects of race and alienage differently, and since then, its refusal to treat them alike. In the final analysis, there is a difference between (1) race, color, religion, sex and national origin and (2) citizenship. The former deal with human characteristics and beliefs, the latter with national allegiance. As Judge Gee states so eloquently:

> Racial and citizenship distinctions are things of a different kind. The former is, for the individual, immutable; the latter is not. The former our polity and increasingly our society as well are resolved, and rightly resolved, to have done with, root and branch, as representing an evil, always and everywhere. The latter is not so readily and roundly condemned: when all is said and done, patriotism remains a civic virtue; and one whose allegiance is bound to another nation may not be suited for certain callings in ours, as the Supreme Court itself has recognized. And while the alien guest is not without his own special claims upon us, arising from our moral tradition, they are of a

different quality from those grounded in our common humanity. (Petitioner's Appendix A at 19a-20a) (footnotes omitted).

The 41st and 99th Congresses of the United States chose not to treat race and citizenship identically. There is no reason to complicate this case by involving it in the *Ruyon* debate.

CONCLUSION

Respondent, First National Bank of Commerce, respectfully submits that the Petition for Writ of Certiorari filed by Jeetendra Bhandari should be denied.

Respectfully submitted,

JAMES B. IRWIN*
CATHERINE KIRGIS SIMPSON
MONTGOMERY, BARNETT, BROWN, READ, HAMMOND & MINTZ
1800 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 561-8989

MARTA ALISON RICHARDS
MONTGOMERY & RICHARDS
1410 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: (504) 522-1717

Attorneys for Respondent
*Counsel of Record